IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11402 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ROHITKUMAR ATMARAM ACHARYA

Versus

EXECUTIVE ENGINEER

Appearance:

1. Special Civil Application No. 11402 of 1994

MRS SANGEETA N PAHWA for Petitioner No. 1

MR DD VYAS for Respondent No. 1

MR AJ SHASTRI for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 25/10/2002

ORAL JUDGEMENT

Heard learned advocate Ms. Pahwa for the petitioner and Mr. D.D. Vyas, learned advocate for the respondents.

By way of this petition, the petitioner workman has challenged the award made by the labour court, Surendranagar in Reference No. 882 of 1989 (Old No. 1490 of 1987) dated 7.11.1992 whereunder the labour court has set aside the order of termination and has granted reinstatement without back wages for interim period, without continuity of the intervening period.

Brief facts of the present petition are to the effect that the petitioner was working with the respondent for a period of two years as tracer and his last salary was of Rs.270.00 plus D.A. and his services were terminated on 5th October, 1981 and at that time, no notice or notice pay in lieu thereof was given and retrenchment compensation has also not been given to the workman. The petitioner was appointed by the respondent through its Executive Engineer after due selection. At the time of termination of his services, junior employees namely Shilaben were continued. The work which was performed by the petitioner was continued when his services were terminated and, therefore, the workman raised industrial dispute after the period of about eight years which was referred for adjudication on 1st December, 1987 to the labour court concerned. Before the labour court, the petitioner workman filed his statement of claim at Exh.6 and the written statement thereto was filed by the respondent at Exh. 8 and, thereafter, the petitioner was examined at Exh. 9 and on behalf of the respondent, one Mukund C. Raval Deputy Executive Engineer was examined and then vide Exh. 14, one another witness Babulal P. Shah was examined by the respondent. Thereafter, the labour court examined the merits of the matter.

The labour court, after appreciating the oral as well as documentary evidence on record, has come to the conclusion that the order of termination passed by the respondent is violative of section 25-F of the Industrial Disputes Act. The labour court also considered that after terminating the services of the petitioner, one employee namely K.G. Patel was appointed by the respondent and the work performed by the petitioner was continued in the respondent establishment even after termination of his services and the same was not closed. The labour court, after considering the length of two years' service, has come to the conclusion that the provisions of section 25-G and 25-H were also violated by

the respondent. The labour court has also considered delay in raising of an industrial dispute from 1981 to 1987 and in view of such delay, the labour court has restrained itself from granting back wages for the intervening period. For denying the back wages to the petitioner for the intervening period, the labour court has also considered that after termination of his services, the petitioner was appointed in Khadi Gram Udyog and, therefore, on that ground also, he is not entitled for the back wages for the intervening period. In the text of the award made by the labour court concerned, there is no discussion about denial of continuity of service to the workman concerned.

Learned advocate Ms. Pahwa appearing for the petitioner has submitted that considering the delay caused in raising of an industrial dispute, she is not pressing the claim for back wages for the period from 1981 to 1987. She has, however, further submitted that merely because the workman has got the job in Khadi Gram Udyog, that itself is not sufficient for denying the back wages from the date of the reference till the date of his actual reinstatement. She has further submitted that at the time of termination of his service, the petitioner was getting the salary in the scale of Rs.270.00 plus Dearness Allowance, total of which was coming to Rs. 1150.00 whereas in the Khadi Gram Udyog, the petitioner was receiving the salary of Rs. 300.00 per month and, therefore, the labour court ought to have appreciated that it cannot be considered as gainful employment and the labour court ought to have granted back wages at least from the date of the reference by deducting the amount earned by the petitioner from Khadi Gram Udyog and some back wages for the intervening period from the date of reference ought to have been granted to the petitioner. She has also submitted that the labour court has also erred in not granting continuity of service. She has further submitted that the labour court has not discussed in the body of the order whether the petitioner is entitled for the benefit of continuity or not but in the operating portion of the award, has simply denied continuity. Thus, denial of the relief of continuity of service is not supported by any reasons and, therefore, that part of the award is also required to be modified by granting continuity of service in favour of the petitioner.

On the other hand, learned advocate Mr.Vyas appearing for the respondent has submitted that the award made by the labour court was challenged by the respondent before this court by filing special civil application no. 5177 of 1993 which was dismissed by this court on

16.8.1993 and at that time, Division Bench of this court has taken into account the denial of back wages for the total intervening period and, therefore, according to him, that question now cannot be reopened and examined by this court in this petition filed by the petitioner. As against that, learned advocate Ms. Pahwa has submitted that if this Court is considering that the denial of back wages for the total intervening period has earlier been considered by this court in aforesaid petition, then, this court may not interfere with such directions issued by the labour court but she has pressed for granting continuity of service since it has been wrongfully denied by the labour court. Mr. D.D. Vyas for the respondent has fairly submitted before this court that as regards claim of continuity of service, there is no discussion appearing in the order passed by this court on 16.8.1993 while dismissing the Special Civil Application no. 5177 of 1993 and, therefore, this court may consider such prayer of the petitioner and may pass appropriate orders.

I have considered the submissions made by the learned advocates for the parties. It is an admitted fact that the petitioner was appointed by the respondent through its Executive Engineer after following due process of recruitment on the post of tracer in the prescribed pay scale and was not a daily wager but was appointed on the permanent post or regular post of tracer in the establishment of the respondent. It is also clear from the impugned award that the labour court has not discussed the fact as to whether the petitioner is entitled for continuity of service or not but this aspect has totally been ignored by the labour court and no reasons have been given by the labour court for denying the continuity of service. Thus, it is clear that the labour court has not applied the mind while denying the continuity of service and, therefore, now question is arising for consideration of this court as to whether the labour court was right in not granting continuity of service to the petitioner or not.

The labour court has granted reinstatement to the workman concerned while setting aside the order of termination. Once termination order is set aside, and reinstatement is granted, it would impliedly cover the continuity of service. It is also clear from the reading of the award that the labour court has not granted reappointment and/or reemployment but has granted reinstatement on his original post and, therefore, in such a situation, the workman is impliedly entitled for continuity of service. This aspect has been considered by this court in case of GSRTC versus Meliyabhai A.

Vasava reported in 2002(3) GLR page 2217 wherein this Court has observed as under in para 11:

"11. After considering the submissions made by both the learned advocates, according to my opinion, when the labour court has modified the order of punishment, and has ordered for employing the workman on the post of peon, then, the labour court ought to have granted continuity of service. Such view has been taken by this Court in Special Civil Application No. 13758 of 1993 decided on 7th March, 2002 wherein this Court has considered the decision of the apex court in case of Sanat Kumar Dwivedi versus Dhar Jilla Sahakari Bhoomi Vikas Bank Maryadit and others reported in 2001 AIR SCW 2430. In para 3 of the said decision, the apex court has observed as under:

"3. It is clarified that this order will not be treated to be resulting in any break in service of the appellant. He will be deprived of only the back wages. The continuity of service and all other notional benefits on that basis will be available to him. It appears that when the order of reinstatement was granted, except depriving him of back wages, it necessarily meant that the continuity of service was implicit in the reinstatement. Even condition Nos. 1 and 2 of the order of reinstatement clearly indicate that he is reinstated in service with continuity as pay scales and other benefits were also directed to be given. "

In para 13 of the said decision, this Court has observed as under:

13. Recently, the apex court has considered the same question in case of Gurpreet Singh and State of Punjab and others reported in 2002 (92) FLR 838. The relevant observations made by the apex court in 1 and 2 of the said judgment are reproduced as under :

"Leave granted.

The Plaintiff is in appeal against the

impugned judgment of the High Court of Punjab and impugned judgment of the High Court of Punjab and services stood terminated and he filed the suit for declaring the order of termination null and void. The suit was dismissed. The lower appellate court, however, on reappreciation of the materials on record, came to the conclusion that the order passed by the D.I.G. must be held to be illegal and consequently directed that the plaintiff should be reinstated in service. Having directed so, the first appellate court categorically held that the plaintiff will not be entitled for any arrears of salary for the period for which he has not served. The plaintiff assailed the appellate decree by filing a second appeal claiming that he would be entitled to the arrears of salary. The High Court by the impugned order not only confirmed the decree of the lower appellate court that the plaintiff will not be entitled to any arrears of salary but also further added that the plaintiff will not get his continuity of service. The plaintiff therefore is in appeal before this Court.

2. Having heard the learned counsel for the parties and on examining the materials on record, we fail to understand how the continuity of service could be denied once the plaintiff is directed to be reinstated in service on setting aside the order of termination. It is not a case of fresh appointment but it is a case of reinstatement. That being the position, direction of the High Court that the plaintiff will not get continuity of service cannot be sustained and we set aside that part of the impugned order. So far as the arrears of salary is concerned, we see no infirmity in the direction which was given by the lower appellate court taking into account the facts and circumstances including the fact that the suit was filed after a considerable length of time. That part of the decree denying the arrears of salary stands affirmed and this appeal stands allowed in part to the extent indicated above. "

Therefore, in view of the observations made by the apex court in two cases as aforesaid and one by this Court as aforesaid, and also considering that the respondent workman was having 18 years past service at the relevant time, and he was given alternative post of peon

> as per the award of the labour court, therefore, according to my opinion, the labour court has committed an error in not granting the continuity in favour of the workman while ordering for alternative post of peon and therefore, to that extent, award made by the labour court is required to be modified."

Therefore, in view of the observations made by the apex court in the decisions referred to by this court in the aforesaid decision, and also in view of the facts of the present case wherein the petitioner was appointed on the post of tracer in the pay scale of Rs.260-400 after following recruitment procedure and his services were terminated on 5.10.1981 without following section 25F, 25H and 25G of the I.D. Act, 1947 and, therefore, order of termination has rightly been set aside by the labour court. In view of the delay in raising of an industrial dispute, the labour court was right in denying the back wages for the intervening period and that has rightly not been pressed by Ms. Pahwa. However,for denying the continuity of service to the petitioner, the labour court has not discussed as to whether the petitioner is entitled for the benefit of continuity of service or not and no reasons have been given by the labour court for such conclusion as stated earlier and, therefore, labour court has committed an error in denying the continuity of service and that part of the award is required to be modified. Therefore, according to my opinion, prayer of the petitioner for claim of back wages for the intervening period even from the date of reference till the date of his reinstatement is required to be rejected and the prayer of the petitioner for continuity of service is required to be accepted in view of the facts of the present case and also in view of the two decisions of the apex court which were considered by this court earlier in aforesaid decision. To that extent, this petition is required to be allowed.

Therefore, for the reasons recorded above, the award made by the labour court Surendranagar dated 7.11.1992 is modified to the extent that the workman petitioner is entitled for the benefit of continuity of service for the entire intervening period and rest of the directions issued by the labour court are confirmed and have not been disturbed. This petition is accordingly allowed in part. Rule is made absolute to the extent indicated hereinabove with no order as to costs.

25.10.2002. (H.K. Rathod,J.)

Vyas